

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**RONALD E. FLOWERS**

Claimant

VS.

**PAYLESS SHOESOURCE**

Respondent

AND

**ZURICH AMERICAN INSURANCE CO.**

Insurance Carrier

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Docket No. 1,033,477

**ORDER**

Claimant requested review of the July 28, 2014, Order by Administrative Law Judge (ALJ) Brad E. Avery. The Board heard oral argument on October 7, 2014.

**APPEARANCES**

John M. Ostrowski, of Topeka, Kansas, appeared for the claimant. Patrick M. Salsbury, of Topeka, Kansas, appeared for respondent and its insurance carrier (respondent).

**RECORD AND STIPULATIONS**

The Board has considered the record and adopted the stipulations listed in the Award.

**ISSUES**

The ALJ denied claimant's motion for penalties, finding the parties stipulated claimant received \$112,838.52 in permanent partial, temporary total and temporary partial disability benefits. The intent of the parties was to provide the claimant with compensation totaling \$112,500.00, so the fact that the intended sum was apparently paid earlier than the schedule of payments called for did not increase the obligation of respondent in regard

to the Award. The ALJ opined claimant has been paid in full and found no further obligation on the part of respondent.

Claimant appeals arguing he negotiated his rights relative to review and modification in good faith based on information provided by respondent. Based on that information a new Award was entered on July 28, 2010, and respondent agreed to the Award, including the future payments itemized therein. Now, respondent alleges an error that existed before the entry of the new Award and claim they owe nothing further. Claimant contends respondent should be ordered to pay its obligation under the new Award, plus penalties and attorney's fees.

Respondent contends the Award on Review and Modification has been paid in full and there is no basis for penalties. Therefore, the Board should affirm the ALJ's Order finding no further obligation on the part of respondent and its carrier.

The issues on appeal are:

1. Is respondent bound by its stipulations and the Award section of the Agreed Award on Review and Modification as previously entered? If so, is claimant owed additional money, and how much?
2. Is claimant entitled to penalties for respondent's failure to comply with the Award on Review and Modification?
3. Is claimant entitled to attorney fees for these Post-Award matters pursuant to K.S.A. 44-536(g)?

### **FINDINGS OF FACT**

#### **History**

Claimant injured his left knee on April 25, 2006, when he tripped and fell walking near a forklift.

On March 5, 2008, the ALJ entered an award granting claimant a limited period of temporary total disability (TTD) benefits, medical expenses associated with his accident and a 12 percent permanent partial impairment to the whole body, which reflects a conversion of the 30 percent impairment to the lower extremity.

Respondent and its insurance carrier appealed the March 5, 2008, Award, to the Board, arguing claimant's knee injury did not give rise to his need for a knee replacement, nor for his subsequent low back complaints. Rather, those conditions were the natural and probable result of his earlier 2001 knee accident and resulting degenerative condition.

At oral argument before the Board, on June 10, 2008, the parties agreed there is no dispute as to the extent of claimant's preexisting impairment to his left knee (20 percent to the lower extremity), and if he sustained a new injury to the left knee on April 25, 2006, as opposed to an injury that was the natural and probable consequence of his earlier accident, his present impairment, following the March 2007 knee replacement, would be a 50 impairment percent to the lower extremity. With credit for the preexisting impairment, the net result would be a 30 percent permanent partial impairment to the left lower extremity. The parties also acknowledged the only rating within the record as to claimant's alleged back injury is a 5 percent permanent partial impairment to the whole body, although the causal connection between claimant's back complaints and his April 25, 2006, accident remained in dispute.

The Board affirmed the ALJ's conclusion as to causation, but modified the Award to reflect a whole body impairment rather than a scheduled injury. The Board went on to find that because claimant sustained injuries to his back, which is an unscheduled injury, all of his injuries, both scheduled and non-scheduled, are to be combined and compensated as a permanent partial whole person disability under K.S.A. 44-510e. A majority of the Board concluded claimant's knee and back impairments should be combined to reflect a whole body impairment. The Board found the lower extremity and the back impairments, when combined, translate to a 15 percent functional impairment to the whole body. The Award was modified accordingly. The Award was also modified to grant TTD benefits from October 23, 2006, to April 24, 2007.

Respondent appealed the Board's Order to the Court of Appeals, arguing claimant should be denied compensation and medical expenses relating to the left knee replacement surgery. Respondent contended surgery was due to the natural progression of an arthritic condition resulting from a prior work-related left knee injury, which resulted in two surgeries to the left knee in 2001. Respondent argued the April 25, 2006, accident did not hasten the need for the 2007 knee replacement.

On June 8, 2009, claimant filed an application for Review and Modification because he lost his job when respondent closed its Topeka facility, resulting in a wage loss.

The Court of Appeals affirmed the Board's Order on June 26, 2009.

On June 28, 2010, the parties entered into an Agreed Award on Review and Modification. The parties entered the following stipulations:

1. Claimant was entitled to an increase in his Award based in part on his separation from employment with respondent, and his April 1, 2010, testimony;
2. The change in payments commenced when claimant ceased employment with respondent on June 1, 2009;

3. The parties stipulated claimant was entitled to \$290.73 per week from June 1, 2009, forward for 253 weeks, totaling \$73,555.14 in additional payments, rendering a total Award of \$112,500.00.

4. Payments in the amount of \$290.73 were to continue weekly until the Award was paid in full, or until claimant's death, whichever occurs first;

5. Claimant retained the right to ongoing future medical for those residuals of his work-related injuries;

6. The parties stipulated that no further reviews of the monetary portion of the Award shall be permitted and that the compensation therein represented all the compensation claimant will received for the remainder of his life.

On December 16, 2013, claimant sent respondent a demand for payment indicating that, as of that date, there were four weeks of compensation due and owing at the rate of \$290.73 or \$1,162.92. Claimant filed an application for penalties on January 9, 2014. Claimant argued the Award on Review and Modification states with particularity the weekly compensation owed to claimant and is controlling. Claimant argued those payments are what the ALJ specifically awarded and respondent's attempt to rely on a section of the Award which limits the total amount to \$112,500.00, is a generic rendition contained in the body of the Award and not controlling as to the amount of compensation actually awarded.

Respondent argued it paid more than the \$112,500.00 that was agreed to and claimant is owed nothing more.

The ALJ entered an Order on claimant's application for penalties finding the intent of the parties was to provide the claimant with compensation totaling \$112,500.00. The fact the intended sum was apparently paid earlier than the schedule of payment allowed does not increase the obligation of respondent in regard to the Award. The ALJ found claimant has been paid in full and there is no further obligation on the part of respondent and its insurance carrier. Claimant's Motion for Penalties was denied. The issue of post-award attorney fees was not addressed in the Order.

Claimant testified that when he signed the Award on Review and Modification he did not have a record of how much money had been paid to him to date. Therefore he could not say whether he has received all of the compensation owed to him. He also did not know how much money had been paid under all of his various workers compensation proceedings, including the proceeding through the Court of Appeals. Claimant testified that when he signed the Award, he had an understanding of what money had been ordered. It was also his understanding when signing the Award, that he would be receiving \$290 or so a week for so many weeks. He understood the rate to be less than his normal compensation rate to account for the Social Security benefits he was receiving.

Claimant did not inform his attorney, Mr. Ostrowski, as to the payments he received before he was represented. When Mr. Ostrowski began representing claimant, most of the payments were made through Mr. Ostrowski's office, with some going directly to claimant.

Claimant did not keep track of his payments. Claimant was under the understanding that he would receive 253 weeks of benefits to June 2014.

At the Post-Award Hearing on March 6, 2014, respondent presented an itemized payment list which was marked as Exhibit A and admitted without objection into the record.

### **PRINCIPLES OF LAW AND ANALYSIS**

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.<sup>1</sup>

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.<sup>2</sup>

Claimant, citing *Dawson*<sup>3</sup>, argues rightly that the Review and Modification award is a new award and stands on its own merits.<sup>4</sup> Claimant further contends the Award section of the Award on Review and Modification is the determining section and is very specific as to the amount and method of payment to be made. While the body of the Award details the amount and length of payments, it also sets a maximum amount of award at \$112,500.00. This amount is a compromise between the maximum amounts allowed for permanent partial disability awards and permanent total disability awards contained in K.S.A. 44-510f. In reviewing Respondent's Exhibit A from the Post-Award Hearing, it is apparent claimant has been compensated beyond the agreed amount of \$112,500.00. Claimant argues the maximum figure contained in the body of the Award, but not the final "Award" section does not control. The weekly payment agreement specified in the final Award section should outweigh the \$112,500.00 agreed maximum payment.

The Board notes, in reviewing the Award on Review and Modification, the payment agreement contemplates 253 weeks of payments after June 1, 2009, at the weekly rate of \$290.73, totaling \$73,555.14. In further reviewing Respondent's Exhibit A, the payments made after June 1, 2009, total \$87,720.58. This would appear to satisfy the payments contemplated in the Award. The determination by the ALJ that claimant has been paid in full is affirmed. The denial of claimant's Motion for Penalties is also affirmed.

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<sup>1</sup> K.S.A. 2005 Supp. 44-501 and K.S.A. 2005 Supp. 44-508(g).

<sup>2</sup> *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

<sup>3</sup> *Dawson v. State of Kansas*, No. 1,044,408, 2012 WL 1652951 (Kan. WCAB April 27, 2012).

<sup>4</sup> *Bryant v. Kansas Workers Compensation Fund*, 19 Kan. App. 2d 1098, 880 P.2d 796 (1994).

Claimant further raises issue with his entitlement to post-award attorney fees. This issue was not determined by the ALJ. As this issue has not been decided by the ALJ, the Board will make no determination on this issue. The Board is limited under K.S.A. 2005 Supp. 44-551 to reviewing issues presented to and decided by an administrative law judge.

### **CONCLUSIONS**

Having reviewed the entire evidentiary file contained herein, the Board finds the Order of the ALJ should be affirmed, although on other grounds. Claimant has been paid in full the amounts specified in the Award on Review and Modification. Respondent and its insurance carrier have no further obligation under said Award.

### **AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Brad E. Avery dated July 28, 2014, is affirmed, although on other grounds.

### **IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of November, 2014.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: John M. Ostrowski, Attorney for Claimant  
karennewmann@mcwala.com  
johnostrowski@mcwala.com

Patrick M. Salsbury, Attorney for Respondent and its Insurance Carrier  
psalsbury@goodellstrattonlaw.com

Brad E. Avery, Administrative Law Judge